ORIGINAL

IN THE

Supreme Court of the United States

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SUPREME COURT, U.S.

October Term, 1976
No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

ERRATA.

Corrections to Petition for Writ of Certiorari.

and

Appendix D to Petition for Writ of Certiorari.

BURT PINES, *City Attorney,*
EDWARD C. FARRELL, *Chief Assistant City Attorney for Water and Power,*
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ERRATA.

Corrections to Petition for Writ of Certiorari.

1. In connection with this submission of Appendix D herewith, please make the following changes in page references to Appendix D in the Petition:

   Page 2, line 26, reference to App. D-4 should be changed to D-6-7

   Page 8, line 3, reference to App. D-13 should be changed to D-18

   Page 11, line 9, reference to App. D-4 should be changed to D-6-7

   Page 16, line 17, reference to App. D-7, 8 should be changed to D-13-15

   Page 18, line 2, reference to App. D-3, should be changed to D-6

   Page 21, line 6, reference to App. D-7, D-8 should be changed to D-13-15

   Page 22, bottom line, reference to App. D-3 should be changed to D-4-5

   Page 24, line 26, reference to App. D-8 should be changed to D-15

   Page 29, line 10, reference to App. D-9 should be changed to D-16

2. Please change references to "Attorneys for Defendants-Appellees" on the front cover and page 36 of the Petition to read "Attorneys for Petitioners".

IN THE

Supreme Court of the United States

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No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

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Appendix D to Petition for Writ of Certiorari.

APPENDIX D.

Marie Manhart et al., Plaintiffs-Appellees, v. City of Los Angeles, Department of Water and Power, a body corporate and politic, et al., Defendants-Appellants. Nos. 75-2729, 75-2807 and 75-2905.

United States Court of Appeals, Ninth Circuit. April 18, 1977.

On Petition for Rehearing.

Before CHAMBERS, DUNIWAY and KILKENNY, Circuit Judges.

DUNIWAY, Circuit Judge:

Appellants petition for a rehearing and suggest a rehearing *in banc*. Their principal reliance is upon the decision of the Supreme Court in *General Electric Co. v. Gilbert*, 1976, ... U.S. ...., 97 S.Ct. 401, 50 L.Ed.2d 343, which was decided on December 7, 1976, just two weeks after our decision was filed on November 23, 1976. We conclude that the *General Electric* case does not require a change in our judgment, for several reasons.

First, in that case, as in *Geduldig v. Aiello*, 1974, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256, upon which the Court primarily relied, the facts were different from the facts in the case at bar. In each of those cases, a program of disability insurance was involved, and in each pregnancy was excluded as a disability. The Court held that the exclusion was not a discrimination based upon gender as such. It pointed out that the exclusion of pregnancy as a disability "divides potential recipients [of benefits] into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." *General Electric, supra,* .... U.S. at ...., 97 S.Ct. at 407, quoting from *Geduldig, supra,* 417 U.S. at 496-97, n. 20, 94 S.Ct. 2485. Thus, said the Court, the exclusion of pregnancy "was not in itself discrimination based on sex," .... U.S. ...., at ...., 97 S.Ct. 401, at 407.

The same cannot be said of the pension plan of the Department in the case at bar. A greater amount is deducted from the wages of every woman employee

than from the wages of every man employee whose rate of pay is the same, How can it possibly be said that this discrimination is not based on sex? It is based upon a presumed characteristic of women as a whole, longevity, and it disregards every other factor that is known to affect longevity. The higher contribution is required specifically and only from women as distinguished from men. To say that the difference is not based on sex is to play with words.

In addition, as the Court pointed out in *General Electric,* under the disability programs in that case and in *Geduldig,* "The 'package' going to relevant identifiable groups . . . —male and female employees—covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that '[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.' *Geduldig,* 417 U.S. at 496-97, 94 S.Ct. at 2492" *General Electric,* .... U.S. ...., p. ...., 97 S.Ct. 401, p. 409 "[G]ender-based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive." [*Id.* at ...., 97 S.Ct. at 409 (footnote omitted).

The pension plan in the case at bar is different. The monthly benefit is the same for men and for women, but the cost to women is higher than the cost to men, and this is solely because they are women. Thus the plan is facially discriminatory because, while the plan is all inclusive as to retirement benefits, it is discriminatory, on the basis of sex alone, as to costs to the employees.

Finally the Court's opinion in *General Electric* requires that we reconsider our analysis of the legislative history of the Bennett Amendment (see part II. B.

of our opinion). However, upon that reconsideration, we conclude that a different result is not required in this case. Appellants stress the Court's reliance, in *General Electric,* upon the colloquy between Senators Humphrey and Randolph, discussed in *General Electric* at ..... U.S. ....., at ....., 97 S.Ct. 401 at 412, and in our opinion at ..... (slip op. at 12-13). We did not find it to be persuasive legislative history; the Supreme Court did find it persuasive. We are, of course, bound by that conclusion, but we do not think that it follows that the judgment in this case is erroneous.

In *General Electric,* the Court relied also, and, we think, more heavily, on rulings of the Wage and Hour Administrator construing the Equal Pay Act, and on the fact that EEOC rulings were inconsistent with each other as well as with the rulings of the Administrator (..... U.S. ....., at ....., 97 S.Ct. 401 at 411-412). In our case, there are no such inconsistencies.

In his brief as amicus curiae in this case, the Secretary of Labor points out that he (or the Administrator acting for him) "has never approved a practice of requiring women employees to make contributions to a pension plan which are larger than those required of similarly situated men employees." (Brief at 6) The rulings of the Secretary on which the Department relies do not deal with a requirement that female employees must make greater contributions to the plan than male employees, a requirement which diminishes the current available or "take home" wages of women, as compared to those of men.

In his June 18, 1964 opinion letter (BNA's WHM 95:607), the Administrator disapproved of a wage differential between men and women based upon alleged higher costs of employing women, a part of those costs being for pensions. In an Interpretive Bulletin issued February 11, 1966 (3 F.R. 2657, 29 C.F.R. § 800.151), the Administrator said:

> A wage differential based on claimed differences between the average cost of employing the employer's women workers as a group and the average cost of employing the men workers as a group does not qualify as a differential based on any "factor other than sex," and would result in a violation of the equal pay provisions, if the equal pay standard otherwise applies. To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purposes of the Equal Pay Act. Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill, effort, and responsibility.

There are no rulings of the Secretary or Administrator inconsistent with this. The one which the Department cites, issued September 9, 1965, and amended May 6, 1966, 30 F.R. 11504 and 31 F.R. 6770, 29 C.F.R. § 800.116(d) deals with employer contribu-

tions, not compulsory employee contributions which are here involved, and which, under 29 C.F.R. § 800.151 cannot be unequal.

No ruling of EEOC conflicts with 29 C.F.R. § 800.151. Nor has EEOC taken inconsistent positions in relation to the problem before us. Its position is stated in 29 C.F.R. § 1604.9, issued April 5, 1972, 37 F.R. 6836, and in EEOC Dec. #75-146 of Jan. 13, 1975, 2 *CCH Employment Practices* 4190, ¶ 6447, both discussed in our opinion. We know of no prior inconsistent rulings. Thus this case is quite unlike *General Electric,* where there was conflict between EEOC rulings and between rulings of EEOC and those of the Secretary of Labor. Here, the administrative rulings, as they relate to the problem before us, are consistent and support the result that we have reached.

The petition for a hearing is denied. The suggestion of a rehearing *in banc* has been transmitted to all judges of the court, and no judge has requested a vote on the suggestion. Rule 35(b) F.R.App.P. The suggestion of a rehearing *in banc* is rejected.

KILKENNY, Circuit Judge, dissenting:

I share the views of the majority on the jurisdictional issues, but have serious reservations with respect to the manner in which the majority disposes of the appellants' claims in No. 75-2729. In my opinion, they should have been allowed to prove their case.

I am convinced that the legal principles enunciated in *General Electric Co. v. Gilbert,* .... U.S. ...., 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), are here controlling and that the district court erred in granting a summary judgment against the appellants. At a minimum, the court should have conducted a trial on the issue of

whether the appellants' retirement plan was justified on the basis of recognized actuarial tables showing the difference in longevity between males and females. As it now stands, the lower court here made the same mistake as the district court in *General Electric* in its refusal to consider any cost differential defense. As stated by the Supreme Court:

> "The District Court was wrong in assuming, as it did, 375 F.Supp. at 383, that Title VII's ban on employment discrimination necessarily means that 'greater economic benefit[s]' must be required to be paid to one sex or the other because of their differing roles in 'the scheme of human existence.'" *General Electric* at ...., 97 S.Ct. at 410, n. 17.[1]

The uncontroverted affidavits in the record before the district court and now before us show clearly that women live substantially longer than men and that the higher female contribution [approximately 15% more than male employees] is fully justified on an actuarial basis. These affidavits further show that this plan, like all annuity plans, is based upon the life expectancy of its beneficiaries, and that mortality tables in use throughout the western commercial world separate male mortality rates from female mortality rates. Moreover, one affiant states that the plan before us was adopted as a result of his 1972 study of the mortality rates of the appellants' employees. The plan follows the "1951 Group Annuity Mortality Table"

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[1]The Supreme Court also noted that the district court ". . . declined to find that the *present actuarial value* of the coverage was equal as between men and women, . . ." *General Electric,* at ...., 97 S.Ct. at 406. [Emphasis added.]

published in the *Transactions of the Society of Actuaries.*

Consistent with all available studies and plans, this particular plan uses separate mortality tables for men and women and was used to determine the total monies that had to be set aside for the lifetime retirement allowances of employees. Many other relevant facts are set forth in these affidavits, including the undisputed statement that no tables have as yet been developed which measure life expectancy on a *unisex* basis, as required by the majority. Furthermore, these affidavits attest to the fact that unisex mortality tables, if de-developed, could lead to a result which adversely affects the financial integrity of annuity or pension plans such as here before us.

GENERAL ELECTRIC v. GILBERT

Against this background, the majority purports to distinguish *General Electric.* From the general finding in *General Electric* that the exclusion of pregnancy was not in itself discrimination based upon sex, it is apparent to me that the Supreme Court has rejected the broad doctrines espoused by the majority. Moreover, neither *Craig v. Boren,* .... U.S. ...., 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), nor *Califano v. Goldfarb,* .... U.S. ...., 97 S.Ct. 1021, 51 L.Ed.2d .... (1977), detract from what is said in *General Electric.* To summarily conclude, like the majority, that "[t]o say that the difference [here] is not based on sex is to play with words. . . ." is simply an inadequate response to the issues presented. I am of the impression that the majority, rather than the appellants, is playing with words. The appellants' claim deserves more consideration than this conclusory statement.

The majority similarly glosses over the language in *General Electric* regarding the *effect* of the exclusion of pregnancy. The Court recongized that a proper showing of "gender-based effects" may be sufficient to establish a *prima facie* case under Title VII, but it was not there present, and it is not here present.[2] This is made manifest by a comparison of the circumstances here present with those of *General Electric.* As stated in *General Electric:*

> ". . . As in *Geduldig, supra,* [417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974)] *we start from the indisputable baseline that '[t]he fiscal and actuarial benefits of the program . . . accrue*

[2]The Court recognized that a proper showing of cause and effect may be sufficient:

> "The instant suit was grounded on Title VII rather than the Equal Protection Clause, and our cases recognize that a prima facie violation of Title VII can be established in some circumstances upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against members of one class or another. See *Washington v. Davis,* [426 U.S. 229,] 96 S.Ct. 2040, 2051, [48 L.Ed.2d 597] (1976). For example, in the context of a challenge, under the provisions of § 703 (a)(2), to a facially neutral employment test, this Court held that a prima facie case of discrimination would be established if, even absent proof of intent, the consequences of the test were *'invidiously to discriminate on the basis of racial or other impermissible classification,' Griggs v. Duke Power Co.,* 401 U.S. 424, 431, [91 S.Ct. 849, 853, 28 L.Ed.2d 158] (1971). Even assuming that it is not necessary in this case to prove intent to establish a prima facie violation of § 703(a)(1), but cf. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-806 [93 S.Ct. 1817, 1824-1826, 36 L.Ed.2d 668] (1973), *the respondents have not made the requisite showing of gender-based effects." General Electric,* .... U.S. at ....., 97 S.Ct. at 408-409. [Emphasis added.] [Footnotes Omitted.]
>
> Footnote 14 on the same page deals with the burden of proof:
>
> "Respondents, who seek to establish discrimination, *have the traditional civil litigation burden of establishing that the acts they complain of constituted discrimination in violation of Title VII. . . ."* [Emphasis Added.]

to members of both sexes,' 417 U.S., at 497 n. 20, [94 S.Ct. at 2492]. We need not disturb the findings of the District Court to note that there is neither a finding, nor was there any evidence which would support a finding, that the financial benefits of the Plan '*worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program,*' *id.,* at 496 [, 94 S.Ct., at 2492]. The Plan, in effect (and for all that appears), is nothing more than an insurance package, which covers some risks, but excludes others, see *id.,* at 494, 496-497, [94 S.Ct. at 2491-2492]. The 'package' going to relevant identifiable groups we are presently concerned with —General Electric's male and female employees— covers exactly the same categories of risk, *and is facially nondiscriminatory in the sense that* '[*t*]*here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.*' *Geduldig,* 417 U.S., at 496-497, [94 S.Ct., at 2492]. *As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive.* For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits,

accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks. To hold otherwise would endanger the commonsense notion that an employer who has no disability benefits program at all does not violate Title VII even though the 'underinclusion' of risks impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than upon the other. Just as there is no facial gender-based discrimination in that case, so, too, there is none here." *General Electric* at ....., 97 S.Ct. at 409-410. [Emphasis Added.] [Footnotes Omitted.]

Similarly, it is obvious here that the fiscal and actuarial benefits of the plan accrue to the members of both sexes. As in *General Electric,* the plan is facially nondiscriminatory to the extent that there is no risk for which one sex is covered and the other is not. Because of the additional contribution made by both the employer and the women employees, the aggregate risk protection for men and women is identical. As a consequence of objectively identifiable characteristics [reflected in actuarial statistics], this plan impacts more heavily upon women than men. [But women live longer than men and ultimately recover as much if not more.] This was also the case in *General Electric* and the Court there refused to find a Title VII violation. Its reasoning is made abundantly clear in Footnote 17, which reads:

> "Absent proof of different values, the cost to 'insure' against the risks is, in essence, nothing more than extra compensation to the employees, in the form of fringe benefits. If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to

the cost of the 'insurance,' there would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than would a male employee who purchased identical disability insurance, due to the fact that her insurance had to cover the 'extra' disabilities due to pregnancy. While respondents seem to acknowledge that the failure to provide any benefit plan at all would not constitute sex-based discrimination in violation of Title VII, see note 18, *infra,* they illogically also suggest that the present scheme does violate Title VII because

'A female must spend her own money to buy a personal disability policy covering pregnancy disability if she wants to be fully insured against a period of disability without income, whereas a male without extra expenditure is fully insured by GE against every period of disability.' Supplemental Brief for Martha Gilbert, *et al.* on Reargument, at 11. Yet, in both cases—the instant case and the case where there is no disability coverage at all—the ultimate result is that a woman who wished to be fully insured would have to pay an incremental amount over her male counterpart due solely to the possibility of pregnancy-related disabilities. Title VII's proscription on discrimination does not require, in either case, the employer to pay that incremental amount. . . ." *General Electric* at ...., 97 S.Ct. at 409-410.

In one respect, at least, the present facts are more compelling than those of *General Electric* because the employer here was actually paying more for each female

employee than for each male employee. The just quoted language would have allowed the employer/appellants to pay the same amount for each, in which case each female employee would have received less insurance protection than each male employee. If no insurance at all was provided under the plan, each female employee, if she purchased outside insurance, would have to pay more than her male counterpart for the same amount of insurance. In either case, after *General Electric* it is illogical to argue that a Title VII violation would result.

Throughout its opinion, the majority substantially exaggerates the strength of its position. It suggests that the Supreme Court was more concerned with inconsistent administrative interpretations than it was with our original and erroneous view of the legislative history. To support its position, the majority finds that there are no such inconsistencies in the case before us. I disagree.

The Wage and Hour Administrator of the Department of Labor has promulgated a number of regulations. After *General Electric,* I question the vitality of the one quoted by the majority; one [29 CFR § 800.116(d)] noted by the Supreme Court in *General Electric* is more in point. This regulation states

> *"If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than the other.* The mere fact that the employer may make unequal contributions for employees of opposite sexes in such

> a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees." [Emphasis Added.]

The majority's tortured views on the obvious breadth of *General Electric* become apparent in its writing around and failure to accept the Supreme Court's application of this regulation. This regulation, as I read it, contemplates the actuarial equivalent of the scheme before us. If employer contributions are equal for men and women, there is no statutory violation even though the resulting benefits are not equal as between men and women. The majority fails to appreciate the significance of this. In the context of pension plans, this rule makes sense only if it is read to impliedly authorize the funding of employee pension plans upon the basis of separate mortality tables. This regulatory justification for a plan with equal contributions and unequal benefits cannot be ignored in the variation before us.

In 1965, the EEOC promulgated regulations under which it agreed to follow the relevant interpretations of the Wage and Hour Division. 29 CFR § 1604.7(b) provided:

> "*Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor.* These interpretations are found in 29 Code of Federal Regulations, Part 800.119-800.163. *Relevant opinions of the Administrator interpreting 'the equal pay for the equal work standard' will also be adopted by the Commission.*" 30 F.R. 14928. [Emphasis Added.]

This regulation was maintained until the EEOC repealed it in 1972, 37 F.R. 6836. Now 29 CFR § 1604.8 discusses the applicability of defenses raised under the Equal Pay Act [administered by the Wage and Hour Division] and states that the EEOC will no longer be bound by the interpretations of the Department of Labor, Wage and Hour Division. Moreover, the EEOC in 1972 for the first time revised its regulations to add 29 CFR § 1604.9(f), which provides that:

> "It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, *or which differentiates in benefits on the basis of sex. . . .*" [Emphasis Added.]

The majority entirely overlooks the fact that this is inconsistent with prior pronouncements of the EEOC and with the other administrative agencies, including the Department of Labor. Under these circumstances, the most recent EEOC interpretation is entitled to little if any weight. *See General Electric* ..... U.S. at ....., 97 S.Ct. at 410-411 where the Court refused to find a Title VII violation even though the employer's plan conflicted with the EEOC regulation. *See also Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92-6, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973). It is also significant that this most recent EEOC interpretation is in conflict with the legislative history of the Bennett Amendment.

One must sympathize with the plight of the appellants —a plan drawn up to comply with the regulations of the Wage and Hour Division will inevitably conflict with the recent regulations of the EEOC. This typifies

the type of "no win" situation alluded to by the Supreme Court in *General Electric* [..... U.S. at ....., 97 S.Ct. at 410, n. 18], and reinforces my conclusion that the discrimination, if any, fostered by this plan is of a type which did not concern Congress when enacting Title VII.[3] Moreover, the majority does not come to grips with the very serious ramifications of its decision. Unless and until unisex tables are developed, an employer, to comply with the EEOC regulations on equal benefits, may not charge any additional amount to his female employees. In thus forcing the employer himself to cover the added amount necessary to assure equal benefits, this makes the employment of females economically unattractive, a result clearly at odds with the thrust of Title VII.

I would grant the petition for rehearing, set aside the judgment of the lower court and remand for a trial on the issue of whether the distinctions under the plan are mere pretexts designed to effect an invidious discrimination against the members of the female sex.

---

[3]As stated in *General Electric* at ....., 97 S.Ct. at 413:

> ". . . When Congress makes it unlawful for an employer to 'discriminate . . . on the basis of . . . sex . . . ', without further explanation of its meaning, we should not readily infer that it meant something different than what the concept of discrimination has traditionally meant, . . ." *Cf. Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (CA6 1977).

I wonder, moreover, whether Congress is even concerned with this kind of thing at the present time. For example, the Agency established by Congress to insure pension plans under ERISA, the Pension Benefit Guaranty Corporation, has already recognized the propriety of using sex segregated actuarial tables. *See* 41 F.R. 48484-48491 (1976) where an interim regulation provides for the use of six such tables in the valuation of plan benefits. Additionally, in view of the lack of any definitive guidelines from the Supreme Court after *General Electric*, it would seem that the majority has gone overboard.

United States Court of Appeals
Ninth Circuit
The Pioneer Courthouse
Portland, Oregon 97204

May 3, 1977

West Publishing Company
50 W. Kellogg Boulevard
P. O. Box 3526
St. Paul, Minnesota 55165

Attention: Mrs. Catherine Gullickson

Dear Mrs. Gullickson:

Re: Manhart v. City of Los Angeles, Dept. of Water & Power, Nos. 75-2729/2807/2905 [CA9, April 18, 1977].

This will confirm telephone conversation of this date whereby we requested the following changes in the above opinion.

(1) Page 706, line 19, column one—Insert a comma between "Now" and "29".

(2) Page 707, line 3, column one—Underscore the words "Unless and until".

(3) Page 707, line 10, column two—Add footnote 4 following the word "sex." as follows:

"4 For that matter, the available writing on the subject would indicate that the use of unisex life tables in connection with pension plans would not result in equal treatment, but rather in unjustifiable discrimi-

---

Even the tax laws, for example, use sex-segregated actuarial tables in the computation of annuity income which results in different periodic taxation burdens as between a man and woman. See 26 U.S.C. § 72(c)(3)(A); Regs. § 1.72-9.

nation. U.S. Commission on Civil Rights, Civil Rights Digest [Winter 1977, p. 45-6]."

Sincerely,
/s/ John F. Kilkenny
John F. Kilkenny

cc:

The Honorable Richard H. Chambers
The Honorable Ben C. Duniway
Mr. Emil E. Melfi, Jr., Clerk

Revised: May 5, 1977

ramifications of its decision. Unless and until unisex tables are developed, an employer, to comply with the EEOC regulations on equal benefits, may not charge any additional amount to his female employees. In thus forcing the employer himself to cover the added amount necessary to assure equal benefits, this makes the employment of females economically unattractive, a result clearly at odds with the thrust of Title VII.

I would grant the petition for rehearing, set aside the judgment of the lower court and remand for a trial on the issue of whether the distinctions under the plan are mere pretexts designed to effect an invidious discrimination against the members of the female sex.[4]

---

[4]For that matter, the available writing on the subject would indicate that the use of unisex life tables in connection with pension plans would not result in equal treatment, but rather in unjustifiable discrimination. U.S. Commission on Civil Rights, Civil Rights Digest [Winter 1977, p. 45-6].